

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MALIK JONES, No. C 07-4277 CW (PR)
Plaintiff, ORDER DENYING DEFENDANTS'
v. MOTION TO DISMISS FOR FAILURE
M. EVANS, et al., TO ATTEND DEPOSITIONS AND
Defendants. ADDRESSING PENDING MOTIONS
(Docket nos. 59, 70, 71, 73)

MALIK JONES, No. C 09-3003 CW (PR)
Plaintiff, ORDER DENYING DEFENDANTS'
v. MOTION TO DISMISS FOR FAILURE
L. WASHINGTON, et al., TO ATTEND DEPOSITIONS
Defendants. (Docket no. 17)

INTRODUCTION

Plaintiff Malik Jones, a state prisoner currently located at High Desert State Prison (HDSP), filed his original pro se civil rights complaint pursuant to 42 U.S.C. § 1983 alleging a violation of his constitutional rights while incarcerated at Salinas Valley State Prison (SVSP) in Case No. C 07-4277 CW (PR).

In its Order dated July 2, 2009, the Court found two cognizable claims against Defendant Bailey: (1) that Defendant Bailey violated Plaintiff's Eighth Amendment right to be free from excessive force when Defendant Bailey pushed Plaintiff out of his wheelchair during a verbal altercation; and (2) that, on May 15, 2003, Defendant Bailey violated Plaintiff's Eighth Amendment rights by acting with deliberate indifference to his safety by creating and distributing a "false 128G chonol [sic] with fabricated information on Plaintiff stating Plaintiff was a child molester/had

1 lewd and or lascivious crimes against children" in an effort to
2 "get Plaintiff killed or seriously injured." (July 2, 2009 Order
3 in Case No. C 07-4277 CW (PR) at 2-3.)

4 The Court also identified two cognizable Eighth Amendment
5 claims against Defendants Washington, Lang and Contrazs for
6 excessive force and deliberate indifference to Plaintiff's medical
7 needs during his transfer from SVSP to HDSP. Plaintiff alleges
8 that on July 7, 2006, Defendant Lang attempted to break Plaintiff's
9 thumb and that an unnamed officer threw Plaintiff to the ground,
10 causing him pain and injury. (July 2, 2009 Order in Case No.
11 C 07-4277 CW (PR) at 3.) Defendants Washington and Lang attempted
12 to break Plaintiff's wrist; and Defendants Washington, Lang,
13 Contrazs and Doe threw Plaintiff on the ground, "causing more pain
14 and injury to [his] head." (Id.) Plaintiff alleges that Defendant
15 Lang used a car door repeatedly to slam Plaintiff's knees and that
16 an unnamed officer slammed the car door so that it would hit
17 Plaintiff in the head. (Id.) Defendants Lang and Doe forcibly made
18 Plaintiff swallow a liquid substance while they laughed at him.
19 (Id.)

20 Defendants filed a motion to dismiss in Case No. C 07-4277 CW
21 (PR) under Federal Rule of Civil Procedure 18(a). They argued that
22 Plaintiff had improperly asserted unrelated claims that had no
23 question of fact common to all Defendants as required by Federal
24 Rule of Civil Procedure 20(a).

25 The Court severed the misjoined parties in Case No. C 07-4277
26 CW (PR). (Id. at 9.) Plaintiff's claims for excessive force and
27 for deliberate indifference against Defendant Bailey remained in
28 Case No. C 07-4277 CW (PR). The Clerk of the Court was directed to

1 open a new case entitled Jones v. Washington, Lang, Contrazs (Case
2 No. C 09-3003 CW (PR)) to address Plaintiff's Eighth Amendment
3 claims for excessive force and deliberate indifference to his
4 medical needs against the named Defendants. (Id. at 5.) The Court
5 also granted Plaintiff's request to amend his complaint to
6 substitute Officer P. Brown for Officer Jane Doe, who he alleged
7 participated in the incident where he was brutalized during his
8 transfer to HDSP. The Court denied Plaintiff's request to amend
9 his complaint to add a retaliation claim against unnamed HDSP
10 officials. Defendants have filed their answers in both cases.

11 Before the Court is Defendants' "Motion to Dismiss for Failure
12 to Attend Depositions." The motion to dismiss in Case No.
13 C 09-3003 CW (PR) explains the severance but otherwise makes the
14 same arguments as the motion to dismiss in Case No. C 07-4277 CW
15 (PR). Defendants in both cases move for dismissal under Rule 30 of
16 the Federal Rules of Civil Procedure; however, as dismissal is not
17 an available sanction under Rule 30, the Court construes their
18 request as a motion to dismiss under Rule 41(b). Plaintiff opposes
19 the motion.

20 Also before the Court in Case No. C 07-4277 CW (PR) are
21 Plaintiff's "Motion of Imminent Danger" and "Motion for
22 Clarification," which are construed as requests for leave to amend
23 his complaint. Plaintiff has also filed a "Motion Requesting Court
24 to Send Exhibits/Declaration of Motions etc.," which is construed
25 as a motion requesting copies of documents from the case file.

26 DISCUSSION

27 I. Motion to Dismiss

28 Plaintiff refused to leave his cell to attend his deposition

1 duly noticed for September 17, 2009. (Def's. Mot. to Change Time to
2 File a Dispositive Mot., Ex. A.) Plaintiff gave Defendants'
3 counsel a memorandum stating, "This deposition was postpond [sic]
4 pending court reconsideration for appoint[ment] of counsel"
5 (Id.)

6 In an Order dated October 28, 2009, the Court denied
7 Plaintiff's motion to stay the deposition and denied his fifth
8 request for appointment of counsel. (Oct. 28, 2009 Order in Case
9 No. C 07-04277 CW (PR) at 2.) The Court directed Defendants to
10 notice another deposition of Plaintiff and ordered Plaintiff to
11 "testify at the properly noticed deposition even if he is not
12 represented by counsel." (Id.) The Court further stated that if
13 Plaintiff did not testify at the deposition "his complaint will be
14 dismissed." (Id.)

15 Defendants' counsel properly noticed Plaintiff's deposition
16 for November 19, 2009. (McDonough Decl., Ex. C.) Defendants
17 allege Plaintiff refused to attend that deposition without being
18 transported to it in a wheelchair, although "Plaintiff was no
19 longer authorized to use a wheelchair" according to a decision by
20 medical staff. (Mot. to Dismiss at 5.) Therefore, Defendants
21 request that this case be dismissed based on Plaintiff's failure to
22 attend two properly noticed depositions.

23 Plaintiff claims that he was physically unable to attend his
24 deposition because prison officials had improperly taken his
25 wheelchair. He argues that he needs a wheelchair because he
26 "suffers from back/spinal trauma which severely limits his
27 mobility." (Mot. of Imm. Danger at 1.) He alleges that in 2005,
28 doctors examined him and "his wheelchair use was made permanent."

1 (Id.) Plaintiff claims that, on October 26, 2009, HDSP officials
2 took his wheelchair. (Id. at 2.) Plaintiff states that he could
3 not use the walker issued by prison medical staff to get to his
4 deposition because his permanently disabled right arm makes the
5 walker only useful for moving around inside his cell. (Opp'n ¶ 5.)
6 He claims that the wheelchair was returned to him on February 7,
7 2010, proving it "never should have been taken in the first place."
8 (Id. ¶ 6.) Plaintiff also claims that on November 19, 2009, HDSP
9 officials "stated they were going to get Plaintiff a wheelchair so
10 that he could go to and attend his deposition of 11-19-09 left and
11 never returned or came back with a wheelchair" (Pl.'s Nov.
12 25, 2009 Letter at 1.) Therefore, Plaintiff contends that he was
13 unable to attend the November 19, 2009 deposition.

14 A plaintiff must prosecute his case with "reasonable
15 diligence" to avoid dismissal. Anderson v. Air West, Inc., 542
16 F.2d 522, 524 (9th Cir. 1976). Plaintiff's complaint alleges that
17 Defendants used excessive force on him on a specific occasion and
18 were deliberately indifferent to his serious medical needs. The
19 amount of force used by Defendants and the medical care Plaintiff
20 did or did not receive for any resulting injuries as well as the
21 circumstances surrounding such allegations are critical to
22 determining the viability of Plaintiff's claims. Moreover,
23 Plaintiff's evidence will largely consist of his version of the
24 events. Defendants are entitled to discover Plaintiff's version of
25 the events in order properly to evaluate the case, the possibility
26 of a dispositive motion and/or settlement, and their trial
27 strategy.

28 Here, Defendants' counsel traveled to HDSP twice to take

1 Plaintiff's duly noticed deposition; however, Plaintiff failed to
2 attend both depositions. It is unclear whether Plaintiff refused
3 or was physically unable to attend the second deposition. As
4 mentioned above, Plaintiff claims that he could not walk and needed
5 a wheelchair to attend that deposition. Defendants did not file a
6 reply refuting Plaintiff. But neither has Plaintiff provided the
7 Court with doctors' notes he claims he has showing that he needed a
8 wheelchair. Given this ambiguity, the Court will give Plaintiff
9 one final chance to sit for a complete deposition, as directed
10 below. Accordingly, the Court DENIES Defendants' motion to dismiss
11 in Case Nos. C 07-4277 CW (PR) and C 09-3003 CW (PR).

12 II. Other Pending Motions

13 The Court construes Plaintiff's "Motion of Imminent Danger" as
14 a request to amend his complaint in Case No. C 07-4277 CW (PR) to
15 add a claim relating to his conditions of confinement at HDSP. It
16 construes Plaintiff's "Motion for Clarification" as a request to
17 amend his complaint in Case No. C 07-4277 CW (PR) to add
18 retaliation claims against corrections officers at SVSP. This is
19 Plaintiff's fourth attempt to amend his complaint. As mentioned
20 above, Plaintiff's previous request to amend the complaint to
21 substitute Officer P. Brown for Officer Jane Doe was granted.

22 Under Rule 15 of the Federal Rules of Civil Procedure,
23 Plaintiff may amend as of right at any time prior to the filing of
24 a responsive pleading and thereafter only with leave of court.
25 Leave must be freely granted "when justice so requires." (Fed. R.
26 Civ. P. 15.) Where a plaintiff seeks to amend after a responsive
27 pleading has already been served, however, the decision whether to
28 grant leave to amend is committed to the sound discretion of the

1 trial court. Waits v. Weller, 653 F.2d 1288, 1290 (9th Cir. 1981).
2 Leave need not be granted where the amendment of the complaint
3 would cause the opposing party undue prejudice, is sought in bad
4 faith, constitutes an exercise in futility, or creates undue delay.
5 See Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 (9th Cir.
6 1994); Roberts v. Arizona Bd. of Regents, 661 F.2d 796, 798 (9th
7 Cir. 1981). The trial court's discretion to deny the motion is
8 particularly broad where . . . a plaintiff has previously been
9 granted leave to amend. Griggs v. Pace American Group, Inc., 170
10 F.3d 877, 879 (9th Cir. 1999).

11 In its Order dated March 12, 2010, the Court denied
12 Plaintiff's first "Motion of Imminent Danger," which was also
13 construed as a request to amend his complaint. (March 12, 2010
14 Order in Case No. C 07-4277 CW (PR) at 9.) It informed Plaintiff
15 that if he seeks to bring an action in federal court about the
16 conditions of confinement at HDSP, he must file a civil rights
17 complaint under 42 U.S.C. § 1983 in the Eastern District of
18 California. Similarly, Plaintiff's pending request to amend his
19 complaint is DENIED without prejudice to filing a new action in the
20 Eastern District relating to the alleged conditions of confinement
21 at HDSP.

22 In Plaintiff's "Motion for Clarification," he seeks leave to
23 amend his complaint to include claims that officers at SVSP
24 retaliated against him for filing this case. "Within the prison
25 context, a viable claim of First Amendment retaliation entails five
26 basic elements: (1) An assertion that a state actor took some
27 adverse action against an inmate (2) because of (3) that prisoner's
28 protected conduct, and that such action (4) chilled the inmate's

1 exercise of his First Amendment rights, and (5) the action did not
2 reasonably advance a legitimate correctional goal." Rhodes v.
3 Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).
4 To prove retaliation, a plaintiff must show that the defendants
5 took adverse action against him or her that "would have chilled or
6 silenced a person of ordinary firmness from future First Amendment
7 activities." White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000)
8 (citing Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283,
9 1300 (9th Cir. 1999)).

10 Plaintiff's retaliation claims are detailed in his July 22,
11 2009 filing (docket no. 46). Although it is titled "Amended
12 Complaint," Plaintiff did not obtain permission to amend his
13 complaint; therefore, the Court construes his pending "Motion for
14 Clarification" as a motion for leave to amend his complaint.
15 Plaintiff alleges first that on or about February 13, 2003,
16 Officers Sandquist and Bocello assaulted him, falsely accused him
17 of assaulting an officer and possessing a knife, held him chained
18 and taped in a prison cage without cause for two days, and forced
19 him into administrative segregation, all because he was prosecuting
20 this civil rights action. Second, Plaintiff claims Warden Evans
21 and Officers Ramirez, Bocello, Martines and Doe, on or around July
22 7, 2006, conspired to kidnap him with an unwarranted transfer to
23 HDSP and failed to intervene to stop the transfer in the weeks
24 preceding it, also in retaliation for Plaintiff filing this case.

25 Plaintiff fails to state a cognizable claim for retaliation.
26 The alleged events occurred several months or years before
27 Plaintiff filed his claim. The majority of the officers implicated
28 by Plaintiff in his July 22, 2009 filing were not involved in

1 either of the occurrences that gave rise to Plaintiff's cases
2 against Defendant Bailey and Defendants Washington, Lang, Contrazs
3 and Brown. In addition, Plaintiff does allege any nexus between
4 the officers' actions and his civil rights litigation. See Huskey
5 v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000) (retaliation
6 claim cannot rest on the logical fallacy of post hoc, ergo propter
7 hoc, i.e., "after this, therefore because of this"). While
8 Plaintiff claims that the correctional officers' actions had no
9 legitimate administrative purpose, there is no indication that the
10 officers would not have acted as they did even if Plaintiff had not
11 filed a civil rights claim. Cf. Pratt v. Rowland, 65 F.3d 802,
12 808-09 (9th Cir. 1995) (inmate who alleged that prison officials
13 transferred him from one prison to another in retaliation for his
14 exercise of his First Amendment rights in giving an interview to a
15 television network did not establish that the transfer was effected
16 for retaliatory reasons, and was not justified by neutral
17 institutional objectives).

18 Even if Plaintiff's retaliation claim was cognizable, filing
19 an amended complaint at this late date -- almost eight months after
20 Defendants filed their responsive pleading -- would cause them
21 undue prejudice and create undue delay. Accordingly, Plaintiff's
22 request for leave to amend his complaint is DENIED. Should
23 Plaintiff wish to pursue these claims, he may initiate a separate
24 litigation by filing a new complaint.

25 Finally, Plaintiff's "Motion Requesting Court to Send
26 Exhibits/Declaration of Motions etc." is construed as a motion
27 requesting copies of documents from the case file for the exhibits
28

1 and declarations specified in the motion. Because he needs these
2 documents to pursue a civil rights claim in the Eastern District,
3 the Court GRANTS Plaintiff's motion for copies of documents and
4 directs the Clerk to send copies of the documents specified below.

5 CONCLUSION

6 1. The Court DENIES Defendants' "Motion to Dismiss for
7 Failure to Attend Depositions" (docket no. 59 in Case No. C 07-4277
8 CW (PR) and docket no. 17 in Case No. C 09-3003 CW (PR)). The
9 Court directs Defendants to notice another deposition of Plaintiff.
10 Plaintiff shall testify at the properly noticed deposition even if
11 he is not represented by counsel. If he does not complete this
12 deposition, the Court will dismiss both actions (Case Nos.
13 C 07-4277 CW (PR) and C 09-3003 CW (PR)) with prejudice for failure
14 to prosecute under Rule 41(b), failure to comply with a court order
15 under Rule 37(b), and failure to attend his deposition under Rule
16 37(d). Unless there are valid security concerns, the Court
17 encourages HDSP prison officials to provide Plaintiff with a
18 wheelchair if he refuses to attend his deposition without one, so
19 that time and expenses are not wasted, the deposition can go
20 forward and the cases can be dismissed if it does not. However,
21 even if prison officials do not provide a wheelchair, the Court
22 will dismiss Plaintiff's cases if he fails to attend and complete
23 the deposition without proof that he was physically unable to do
24 so.

25 2. The Court DENIES without prejudice Plaintiff's "Motion of
26 Imminent Danger" (docket no. 70 in Case No. C 07-4277 CW (PR)),
27 construed as a request to amend his complaint in Case No. C 07-4277
28 CW (PR). Plaintiff may file a new action in the Eastern District

1 of California relating to the alleged conditions of confinement at
2 HDSP.

3 3. The Court DENIES without prejudice Plaintiff's "Motion of
4 Clarification" (docket no. 71 in Case No. C 07-4277 CW (PR)),
5 construed as a request to amend his complaint in Case No. C 07-4277
6 CW (PR). Plaintiff may file a new action making these allegations.

7 4. The Court GRANTS Plaintiff's "Motion Requesting Court to
8 Send Exhibits/Declaration of Motions etc." (docket no. 73 in Case
9 No. C 07-4277 CW (PR)), construed as a motion requesting copies of
10 documents from the case file. The Court directs the Clerk to send
11 copies of the following documents from Case No. C 07-4277 CW (PR)
12 to Plaintiff:

13 a. "Motion of imminent danger" (docket no. 56);

14 b. "Motion informing the Court of incident in re
15 deposition of 11-19-09" (docket no. 57); and

16 c. "Declaration of Malik Jones to Add Declaration in
17 Support of In Re Motion filed 11/22/09" (docket no. 58).

18 5. This Order terminates Docket nos. 59, 70, 71 and 73 in
19 Case No. C 07-4277 CW (PR) and Docket no. 17 in Case No. C 09-3003
20 CW (PR).

21 IT IS SO ORDERED.

22 DATED: 7/20/2010



23 CLAUDIA WILKEN
24 United States District Judge
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